

July 10, 2002

*By facsimile & overnight mail*

Commissioner Marc Spitzer  
Commissioner Jim Irvin  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007-2996

Re: AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer and Commissioner Irvin:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letters to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Commissioner Spitzer asked the parties to address the differences in the letters submitted by Qwest and Eschelon. Therefore, Eschelon submits this Reply to Qwest's letter to the Commission of June 27, 2002 ("Qwest's June 27 Letter") and the Response of Qwest Corporation to Staff's Request for Comment dated June 27, 2002 ("Qwest's Comments"). Because Qwest criticized Eschelon's previous letter as "unverified rhetoric" (*see* Qwest's June 27 Letter, p. 1), Eschelon attaches exhibits to further support the information provided.

### **Change Management Process**

The Change Management Process ("CMP") is a primary example of an area in which the information provided by Eschelon and Qwest varies greatly. Eschelon has participated in the CMP (formerly "CICMP") for about as long as any Competitive Local Exchange Carrier ("CLEC"). Although Qwest's June 27 Letter and Qwest's Comments characterize CMP as though it were an arm of the 271 process, that is not the case. Eschelon's participation in CMP was not some effort to involve itself in the 271 proceedings. Quite the reverse is true. Long after Eschelon's initial participation in CMP, some 271 issues were interjected into the CMP-Re-design process when Qwest referred issues from the 271 workshops to the CMP Re-design team. Although some 271 issues were discussed, participation in CMP is far from being the same as participation in 271. Issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. These include commercial performance issues. Even if another party mentioned some of these issues in 271 proceedings, the participants in those proceedings did not have the benefit of explanation by Eschelon, which had first-hand commercial experience with the problems.

Because CMP is an important issue about which Qwest's filings vary greatly from Eschelon's information, Eschelon will provide additional information from which the Commission may decide which party more accurately and fairly captured the course of events.<sup>1</sup> About CMP, Eschelon said:

Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon's President personally attended CMP monthly and Re-Design meetings to determine whether Qwest's attacks on Eschelon representatives were fair and whether Qwest's representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon's President concluded that Qwest's statements were not fair or accurate and the Eschelon's CMP participation was appropriate and necessary to resolve critical business issues. Eschelon's President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon's perspective. Mr. Martin did not do so.

See Eschelon's Letter to Commissioner Spitzer, p. 5 (June 24, 2002) ("Eschelon's June 24 Letter"). Qwest did not address Eschelon's first statement from the above quotation about CMP (that Qwest had Eschelon representatives pulled from CMP Re-Design meetings) in Qwest's June 27 Letter or Qwest's Comments. Therefore, Eschelon will respond to the issues Qwest did address first and then return to this issue.

### **Comments on CMP Status Report**

Eschelon's second statement about CMP was that Qwest "reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report." Eschelon's June 24 Letter, p. 5. In response to this statement, Qwest said: "In fact, Eschelon *only* submitted specific comments regarding Qwest's monthly CMP re-design status reports *on a single occasion*." Qwest's June 27 Letter, p. 2. (emphasis added). Enclosed, however, are copies of specific comments regarding Qwest's monthly CMP re-design status submitted by Eschelon to Qwest on *two* occasions. See Exhibits 2 - 3.<sup>2</sup> As Eschelon indicated in Eschelon's June 24 Letter, Eschelon's October 2001 comments are critical of Qwest's status report. See Exhibit 2. Eschelon submitted a copy of Exhibit 2 to Greg Casey, Audrey McKenney, and Dana Filip of Qwest on Friday,

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<sup>1</sup> See Exhibit 1 (Verification of F. Lynne Powers).

<sup>2</sup> Qwest states that it attached a copy of Eschelon's redlined version of the status report as an exhibit to the report. See Qwest's June 27 Letter, p. 2. Qwest attached Eschelon's comments with respect to Exhibit 3 (see Exhibit 4), but not Exhibit 2. Qwest also refers to a "high level" email submitted by Eschelon. See Qwest's June 27 Letter, p. 2. A copy of that separate email is attached as Exhibit 5.

October 5, 2001 and to Andrew Crain on October 9, 2001. *See* Exhibit 2 (cover email to Mr. Crain). Ms. Filip is Qwest's Senior Vice President of Global Service Delivery, and Mr. Crain is a Qwest attorney. Both Ms. Filip and Mr. Crain are Core Team Members of the CMP Re-design Team. *See* Exhibit 6.

After Eschelon submitted its October 2001 comments on Qwest's CMP status report to Qwest, Mr. Crain reportedly mentioned the comments to WorldCom's attorney Thomas Dixon. Mr. Dixon is an active member of the CMP Re-design Team and active participant in the 271 proceedings in several states, including Arizona. Mr. Dixon asked Mr. Crain for a copy of Eschelon's comments. Mr. Crain responded that he was "mixed up." *See* Exhibit 7. Although Mr. Crain had Eschelon's comments in his possession at the time, as shown by Exhibit 2, Mr. Crain told Mr. Dixon that Eschelon had not "sent anything." *See* Exhibit 7. Despite these facts, Qwest represents to the Commission that "Qwest in no way attempted to limit the distribution or use of Eschelon's comments." Qwest's June 27 Letter, p. 3.

With respect to the October 2001 comments, Eschelon management agreed to provide them directly to Qwest management, instead of submitting them by email to the entire CMP Re-design Team. Eschelon did so for two reasons: (1) to show a spirit of cooperation because Qwest had indicated that it would resolve pressing disputes with Eschelon (which it later did not do); and (2) to respond to attacks by Ms. Filip and Ms. McKenney on Eschelon's participation in the CMP Re-design process made with the purpose of decreasing that participation. *See* Exhibit 8; *see also* discussion below. In these situations, Ms. McKenney sometimes characterized Eschelon as a "bad" business partner. Given Qwest's monopoly supplier position, Eschelon did not need to be expressly reminded that Qwest had the ability to punish conduct it deemed to be "bad."

#### **Withdrawal of Change Request Relating to Qwest Anti-Competitive Conduct**

Eschelon's third statement about CMP was that Qwest "required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs." Eschelon's June 24 Letter, p. 5. In September of 2001, CLECs participated in a call to discuss CMP issues. One of the issues discussed was whether a Change Request would be the appropriate vehicle to raise with Qwest the topic of anti-competitive conduct. Allegiance Telecom ("Allegiance") said that it had recently experienced instances when it believed Qwest personnel gave false information to Allegiance's customers (such as that the customers' service would go down if they proceeded to converting with Allegiance). Eschelon said it had recently had a similar experience. They agreed that a Change Request would be an appropriate avenue for addressing these issues.

On or about September 25, 2001, Allegiance submitted its initial Change Request relating to this issue. *See* Exhibit 9. Allegiance asked Qwest to establish an improved process for reporting occurrences of anti-competitive behavior, including a single point of

contact, a thorough investigation, an appropriate and timely response to CLECs, and proper training of Qwest personnel to prevent future occurrences. *See id.* Qwest assigned the Change Request number PCC092701-3. *See id.* The initial Change Request contained the name and badge number for the Qwest technician alleged to have made inappropriate statements. Eschelon copied the description of the Change Request, containing this information from Qwest's web page. *See id.* Shortly afterward, Eschelon could not find the Change Request on the web page. Today, a slightly modified version of the Change Request (without the technician-identifying information) is posted on the web page with the archived Change Requests, and it has a "Withdrawn" status. *See Exhibit 10.* Allegiance has indicated that Qwest met with Allegiance in October of 2001 and that Qwest, including Ms. McKenney, asked Allegiance to withdraw the Change Request. Qwest's written Status History for the Change Request (posted on the Qwest web page), however, does not document the meeting between Allegiance and Qwest or the fact that Qwest asked Allegiance to withdraw the Change Request. *See Exhibit 10.*<sup>3</sup>

On September 28, 2001, Eschelon also submitted a Change Request relating to this issue to the Qwest CMP. *See Exhibit 11.* Eschelon described a situation in which a Qwest representative told a customer switching to Eschelon that Eschelon was filing for bankruptcy, which was not a true statement. *See id.* Eschelon asked Qwest to develop a written process to help prevent similar situations in the future. *See id.* Eschelon asked Qwest to include in the process steps for training Qwest employees, reporting the conduct, responding to such situations, and communicating to CLECs on the action taken. *See id.* As in the case of the Allegiance Change Request, Eschelon was seeking a process solution and was not simply reporting an isolated incident.<sup>4</sup> Qwest is required to provide a Change Request number to the requesting CLEC and log that number into its database within two days after receiving a completed CR. *See CMP Document at § 5.3.*<sup>5</sup> Qwest did not do so and said, on October 10, 2001, that it had not provided a number because it was "clarifying this issue internally." *See Exhibit 12.* The documented CMP process does not provide for such a step. Qwest (Ms. McKenney and Ms. Filip) asked Eschelon to withdraw the Change Request from CMP, indicating Qwest did not believe

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<sup>3</sup> When Eschelon later raised an issue relating to the handling of these Change Requests with the CMP Re-design team, Qwest criticized Eschelon for using technician-identifying information in its Change Request and stated that this was one of the reasons that Qwest asked Eschelon to withdraw the Change Request. Eschelon pointed out that this was not the reason given to Eschelon at the time and that Eschelon's Change Request did not contain technician-identifying information. Qwest confused the Change Requests submitted by Allegiance and Eschelon. Eschelon did distribute the Allegiance Change Request to the Core Re-design Team at the later date, but the information provided was taken from Qwest's published web page.

<sup>4</sup> Eschelon remains dissatisfied with Qwest's approach to these issues. Since then, Eschelon has reported to Qwest additional instances of inappropriate comments by Qwest representatives to Eschelon customers. Afterward, Qwest provides, at most, a vague statement that Qwest investigated and will take appropriate steps. Eschelon does not know what steps were taken either in the particular case or to avoid additional instances in the future. If Qwest had accepted the Change Requests of Eschelon and Allegiance, perhaps a better process would be in place by now.

<sup>5</sup> *See* <http://www.qwest.com/wholesale/cmp/re-design.html>.

that circulating such examples to other CLECs was consistent with the requirement not to oppose Qwest in 271. Eschelon withdrew the Change Request.

Qwest admits that it asked Eschelon to withdraw the Change Request. *See* Qwest's June 27 Letter, p. 3. Qwest claims that its only reason for doing so was that the "issue related to employee performance, rather than a systemic process issue." *Id.* In that case, according to the governing CMP Document and consistent with the handling of other Change Requests at the time, Qwest should have assigned the Change Request a number, posted the Change Request on its wholesale web page, stated in a written response its position that the issue related to employee performance, posted that response (and its request to withdraw) as part of the Status History, and given the Change Request a published status of "Withdrawn." Qwest followed none of these documented procedures.

Moreover, in both the Eschelon and the Allegiance situations, Ms. McKenney was involved in asking a CLEC to withdraw a Change Request. Ms. McKenney is Senior Vice President of Wholesale Business Development at Qwest. Ms. McKenney is not a member of the CMP team or the service management team. Ms. McKenney handled the bulk of the negotiations of unfiled agreements with Eschelon. The reason given by Qwest for its request to withdraw the Change Request does not explain Ms. McKenney's involvement.

### **Other Qwest Steps to Inhibit Eschelon's CMP Participation**

Eschelon's fourth statement about CMP was that Qwest "took other steps to inhibit Eschelon's participation in CMP/CMP Re-design and prevent information from becoming known." Eschelon's June 24 Letter, p. 5. Qwest claims that Eschelon's participation in CMP was "full" and "never restricted." *See* Qwest's June 27 Letter, p. 3 & Qwest's Comments, p. 7. In April and June of 2001, however, Ms. McKenney of Qwest was calling Eschelon's President to complain that Eschelon should not be participating in Qwest's CMP meetings. Eschelon attempted to reason with Qwest by explaining Eschelon's business need for participating in CMP and describing the competitive disadvantage to Eschelon if prevented from participating in CMP. *See, e.g.*, Exhibit 13. A comparison of Exhibit 13 with Qwest's June 27 Letter and Qwest's Comments raises the question of why Eschelon had to make these arguments at all, if Eschelon's participation in CMP was as free and uninhibited as suggested by Qwest. Note that Ms. McKenney did not write back to Eschelon and say that there has been some misunderstanding and, of course, Eschelon could participate freely in CMP. That was not Qwest's position.

Qwest's efforts to inhibit Eschelon's CMP participation also extended to CMP Re-design meetings. In October of 2001, for example, Ms. Filip specifically asked Eschelon to refrain from participating in a CMP Re-design Team discussion of the interim process for the Qwest Product Catalog ("PCAT"). *See* Exhibit 8. Despite

Eschelon's strong objections to the PCAT process, Eschelon believed it did so, as Qwest requested. *See id.* Nonetheless, Ms. Filip called Eschelon immediately after that session to complain that Lynne Powers of Eschelon had provided some comments when she should have been silent. The effects of Eschelon's silence on this particular occasion far outlasted the particular meeting. Qwest made many changes to the PCAT with either no notice to CLECs of the particular change or at least no red-lining accompanying a notice to show the nature of the change. By the time Eschelon was able to participate on this issue again, Qwest argued that it was too late to go back and provide information to CLECs on the changes made earlier. Therefore, Eschelon and other CLECs never received red-lined documents showing what had changed for many changes to the PCAT.

Ms. Filip and Ms. McKenney generally took the position that the Escalation Letter barring Eschelon from participating in 271 proceedings<sup>6</sup> also entailed that Eschelon should either be silent or support Qwest's position on other issues in the CMP monthly and Re-design processes. Qwest said that Eschelon had an obligation to deal directly with Qwest executives instead of raising issues in the CMP arena. Eschelon did not believe, however, that Qwest could separately address the types of issues Eschelon raised in those proceedings without affecting other CLECs and that consequently a bilateral approach would be futile. Eschelon provided Qwest management with a summary of Eschelon's pending and recently closed Change Requests to attempt to show the detailed nature of the issues, many of which affected other CLECs, to convince Qwest of Eschelon's legitimate business need to raise in the context of CMP. *See* Exhibit 8. Again, if Qwest was not opposing Eschelon's participation in CMP, the question is raised as to why Eschelon needed to expend resources creating such summaries and trying to persuade Qwest of the need for Eschelon's participation. Qwest verbally opposed Eschelon's arguments. On October 16, 2001, Ms. Filip told me and Eschelon's President on a conference call that Qwest expected Eschelon to not only withdraw the Change Request discussed above but also limit Eschelon's participation in other ways. For example, Ms. Filip asked Eschelon to reduce the number of communications to other CLECs and the testers<sup>7</sup> concerning Qwest's failings (such as by not copying emails to other members of the CMP Re-design Team) and discuss performance issues off line rather than in meetings attended by others.

The arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months. Although Qwest appears to praise Eschelon's participation in the CMP process in its letters to the Commission, Qwest does

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<sup>6</sup> *See* Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (copy attached as Exhibit 14).

<sup>7</sup> For example, on April 3, 2001, Qwest's attorney Laurie Korneffel told Eschelon that Qwest was "comfortable" that Eschelon's participation in a KPMG question/answer proposal would not violate the agreement not to oppose Qwest in 271, but she said that Qwest "would not be in favor of Eschelon serving as a 'test' CLEC." *See* Exhibit 15. Eschelon had to inquire of Qwest as to the boundaries of the limitations on Eschelon's participation, because it had become clear that Qwest interpreted the 271 limitation more broadly than Eschelon.

not disclose that verbally it took a very different stance in its ongoing discussions with Eschelon at the time. Ms. Filip and Ms. McKenney represented that Eschelon's representatives were causing "havoc" in the CMP monthly and Re-design meetings. *See id.* On January 12, 2002, Eschelon's President summarized Qwest's attempts to decrease Eschelon's CMP participation over the last year as a "constant irritant" to the business relationship. *See Exhibit 16.*

In an attempt to put the issue to rest and prove Eschelon's position, as indicated in Eschelon's June 24 Letter (p. 5), Eschelon's President asked Qwest's Executive Vice President of Global Wholesale Markets Gordon Martin to attend the CMP and Re-design sessions, as Eschelon's President had done. *See id.* Along with Ms. McKenney, Mr. Martin was intimately involved in the negotiations with Eschelon, including negotiation of proposed terms that would limit Eschelon's participation in CMP.<sup>8</sup> Eschelon's President told Mr. Martin that CMP attendance "is the only way that you can determine what goes on as both sides have different views as to what happens at these sessions." *See id.* Exhibit 16 clearly shows that Eschelon's request for Mr. Martin's attendance was made in the context of resolving the issue of Qwest's persistent requests to limit Eschelon's CMP participation. Nonetheless, Qwest's Letter reads as though Eschelon made an unrelated and unprecedented request for upper management to attend CMP meetings. *See Qwest's June 27 Letter*, p. 3. Qwest then represents to the Commission that there "was nothing wrong with Qwest's selecting its representatives who had knowledge about the detail at issue at CMP meetings." *Id.* Eschelon agrees that knowledgeable Qwest employees should attend CMP meetings. This is not, however, the issue that the Commission seeks to investigate and upon which Eschelon commented. The relevant issues are the reason for Eschelon's request that Mr. Martin participate in some CMP meetings and Mr. Martin's (and Ms. McKenney's) conduct in pressing Qwest's efforts to decrease Eschelon's CMP participation without personally observing the Eschelon behavior that Qwest employees characterized as causing "havoc."

### **Excluding Eschelon From CMP Meetings**

As mentioned above, Qwest did not address Eschelon's first statement about CMP in its June 24 Letter -- that Qwest "had Eschelon representatives pulled from CMP Re-Design meetings" -- in Qwest's June 27, 2002 Letter or Qwest's Response. It does not do so, even though Qwest directly responded to Eschelon's statements about Qwest's not disclosing comments on a status report and asking Eschelon to withdraw a Change

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<sup>8</sup> Eschelon took the position that, if Qwest was going to impose limitations on Eschelon's CMP participation, Qwest needed to be clear in its expectations, so that Eschelon would not continue to be criticized by Qwest after the fact for alleged infractions. At a meeting on January 8, 2002, Ms. Filip agreed to provide clear, written expectations to Eschelon by January 11, 2001. On January 11, 2002, Mr. Martin said that Qwest's legal department advised not to provide a written list. He said that, instead, Ms. Filip would call Eschelon to verbalize a list and then there would be some documentation of agreed upon issues. Ms. Filip did not provide a verbal list or later documentation after that date. The parties did not agree on this issue.

Request. Eschelon believes a reasonable conclusion to draw from Qwest's silence on the specifics of this point is that Qwest admits that it pulled Eschelon representatives from CMP Re-design meetings. Qwest broadly states, however, that Eschelon's participation in CMP Re-design was "never restricted," Qwest's Comments, p. 7, so this assertion needs to be addressed.

Qwest excluded Eschelon from virtually all of the Qwest CMP Re-design meetings that took place on October 30, 2001 through November 1, 2001. Lynne Powers of Eschelon planned to participate in those sessions by telephone, and Karen Clauson of Eschelon flew to Denver at Eschelon's expense with the plan of staying through the November 1<sup>st</sup> meeting. *See* Exhibit 17. As indicated on Qwest's Attendance Record for that meeting, however, Eschelon did not participate on either October 31 or November 1, 2001. *See* Exhibit 18 at Attachment 1. The minutes of the meeting show that both Ms. Powers and Ms. Clauson participated in the meeting on the morning of October 30. *See id.* During this portion of the meeting, the parties were reviewing the agenda and indicating topics that they would like to cover. Eschelon listed several topics. *See id.* After Eschelon started to do so, Ms. Filip left the meeting and participated in a conference call with William Markert, Robert Pickens, and myself of Eschelon.

During the call on October 30, 2001, Ms. Filip threatened that, if Ms. Powers and Ms. Clauson did not stop participating in the meeting immediately, Ms. Filip would *devote all of her energies* to making Eschelon miserable. Specifically, Ms. Filip said, in an angry manner, that she would devote all of her energies to ensuring that Ms. McKenney succeeded in her objectives. I personally heard her make this statement. *See also* Exhibits 19 - 20 (Verification Affidavits of Mr. Markert and Mr. Pickens).<sup>9</sup> This told Eschelon two things: (1) that Ms. Kenney's objectives were adversarial to those of Eschelon, even though Ms. McKenney represented that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm Eschelon's business. Ms. Filip, as Qwest's Senior Vice President for Global Service Delivery, holds Eschelon's lines in her hands. Given the real harm that someone in Ms. Filip's position could do to a business such as Eschelon's, Eschelon had no choice but to capitulate. Ms. Powers dropped off the call. Ms. Powers joined the conference bridge to ask Ms. Clauson to leave the meeting to take a call from her in the hallway. Afterward, as a result, Ms. Clauson had to check out of

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<sup>9</sup> Because Qwest made these statements verbally and not in writing, it has the advantage of saying that Eschelon cannot provide written evidence of Qwest's own statements. In addition to affidavits from Eschelon's participants in the conversation, the Commission has the outside evidence showing that Eschelon intended to participate fully in the meetings but then left abruptly. *See, e.g.,* Exhibit 17. When viewed in the context of all of the other Exhibits provided with this Reply, that conduct is consistent with the evidence that Qwest was attempting to limit Eschelon's participation in CMP. Similarly, Eschelon's statements in its February 8, 2002 letter (discussed in Qwest's Comments, p. 8) should be read in the context of all of the Exhibits to this Reply and, in particular, Exhibit 21. Given Qwest's heavy reliance on oral communications (even including at least one oral agreement with a competitor, *see* Qwest's Comments, at 8), the Exhibits are as much or more written documentation as can be expected to dispute the claims in Qwest's June 27 Letter and Qwest's Comments.



her hotel early and return to Minneapolis. *See* Exhibit 17. Eschelon had raised issues that it believed needed prompt discussion, but Eschelon did not participate in the remainder of the meeting on October 30, or the meetings on October 31 and November 1. Despite Qwest's statements to the contrary, being excluded from meetings restricts participation in the process and prevents a party from raising issues at those meetings. *Cf.* Qwest's Comments, p. 7 ("never restricted") & Qwest's June 27 Letter, p. 3 ("No re-design participant, including Eschelon, has ever been prevented from raising any issue during that process.").

### **Timing of Qwest's Ending Specific Payments to Eschelon**

As indicated, the arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months, over which time Eschelon became more resolved that it needed to participate in the meetings. In other words, over this period of time, it became clear to Qwest that Eschelon was not going to remain silent or just do as it was told. As Eschelon pointed out in its June 24 Letter (p. 5, note 14), during the same general time frame<sup>10</sup> when Qwest was having this realization, Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. Although Qwest is well aware of the facts, Qwest complains in its June 27 Letter (p. 4) that Eschelon's statements are "vague and non-specific." To address that complaint, Eschelon will be clear about the payments that Qwest stopped, the timing, and the effect on Eschelon.

The Consulting Fee Agreement (¶ 3) required Qwest to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest November 15, 2000 through December 31, 2005."<sup>11</sup> A later agreement provided that Qwest would pay this amount to Eschelon on a quarterly basis. This is a written contractual obligation that Qwest has defended as a legitimate settlement agreement. Qwest is not claiming that Eschelon breached this provision. To the contrary, Qwest recently submitted sworn testimony indicating that Qwest now places a "very high value" on the consulting services of Eschelon.<sup>12</sup> Given that according to Qwest's own account Eschelon was in compliance with the written contract, no legitimate basis existed for Qwest to stop payment under that agreement. Qwest stopped paying Eschelon pursuant to this provision, however, after August of 2001. In the

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<sup>10</sup> Eschelon uses the term "general" time frame because Qwest payments may be late or may not be due for a set period of time. Therefore, the exact date on which Qwest stopped payments can be difficult to pinpoint.

<sup>11</sup> *See* Confidential Amendment to Confidential/Trade Secret Stipulation (Nov. 15, 2000) ["Consulting Fee Agreement"], at ¶ 3; provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271.

<sup>12</sup> *See* Qwest Corporation's Written Direct Testimony of Judith Rixe, p. 9, line 15, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (April 22, 2002) ["Rixe Testimony"].

absence of a breach, one looks for other factors to explain Qwest's refusal to honor its contractual commitment while Eschelon was providing services of "high value."

Qwest claimed that it was withholding payment because Eschelon had complained that switched access minutes were missing and that Qwest had not delivered on its promise to negotiate pricing adjustments, and negotiations were continuing as to these and other issues. Those issues, however, were separate from the undisputed consulting fee. Qwest could have continued to honor its written obligation to pay the consulting fee, as it was required to do by the contract, while disputed issues were negotiated. Instead, Qwest made it a condition of resolution of Eschelon's legitimate access, service quality, and pricing complaints that the Consulting Fee Agreement be terminated.<sup>13</sup> Unilaterally enforcing its position, Qwest stopped paying the consulting fee. The last payment was for August of 2001.<sup>14</sup> There is a correlation between the timing of Eschelon's assertion of its various rights and Qwest's stopping of the payments. Qwest knew full well the impact of its action, particularly in the prevailing telecommunications market. Because bankruptcies were so common at that time, one could hardly open a telecommunications publication during this period without reading about another one. Qwest earns more revenue by the second day of January in each year than Eschelon earns in an entire year. Qwest knew which party's bargaining position would be most adversely affected by its decision to stop payments.

When Eschelon raised this issue previously, Eschelon said that it "does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped." *See* Eschelon's June 24 Letter, p. 5, note 14. As indicated, Eschelon does not have access to all of the information necessary to make this determination. Eschelon is aware that other unfiled agreements between other carriers and Qwest have been disclosed, including an agreement or agreements that require payments to McLeodUSA. McLeodUSA was initially a CMP Core Team Member, but its status was changed for failure to participate actively in the working sessions. *See* Exhibit 18, pp. 11-12. Eschelon has had no opportunity to review the various McLeodUSA agreements, nor is it requesting that here. Eschelon can only state that it cannot confirm one way or another whether McLeodUSA (or any other

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<sup>13</sup> Qwest attempted to impose other conditions as well, as discussed below with respect to the proposals signed by Ms. McKenney. *See* Exhibit 21.

<sup>14</sup> The Switched Access Reporting Agreement required Qwest to pay Eschelon the difference between \$13.00 per line and \$16.00 per line from January 1, 2001 until the parties agreed to do otherwise. *See* Letter from Audrey McKenney to Eschelon's President, p. 2 (July 3, 2001) ["Switched Access Reporting Letter"] (provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271). Although the parties did not agree to do otherwise until March 1, 2002, Qwest also stopped paying Eschelon pursuant to the Switched Access Reporting Letter as of September 2001. Eschelon (not Qwest) had complained about other switched access reporting issues. Unlike the consulting fee, at least some other access issues were the subject of a dispute. When payments stopped, however, there was no dispute that the \$3 per line (approximately \$150,000 per month) was due to Eschelon pursuant to the terms of the Switched Access Reporting Letter. Qwest was not claiming, for example, that Eschelon had yet agreed otherwise.

carrier) payments, if any, continued while its participation in the CMP Core Team decreased and, if so, whether the two issues are related.

In response to Eschelon's initial statement along these lines, Qwest objects to the possible implication that "Qwest made payments to other CLECs to keep them from participating in the CMP process." *See* Qwest's June 27 Letter, p. 4. Qwest implies that Eschelon has no evidence that would suggest that Qwest would do such a thing. Enclosed with this Letter is a document, provided to Eschelon by Qwest and signed by Ms. McKenney, that provides that Qwest was willing on October 30, 2001 to pay Eschelon money as long as Eschelon refrained, among other things, "from participating in . . . Change Management Process workshops." *See* Exhibit 21 (Qwest Proposed Confidential Purchase Agreement ¶ 3). Although Eschelon did not sign this proposal, Qwest was clearly making the offer. Eschelon does not know whether any other carrier was offered and accepted this or a substantially similar proposal. The fact that Qwest made the offer to Eschelon, however, raises the legitimate question as to whether this occurred at the same or any other time.

Eschelon does not have copies of all of the approximately 100 unfiled agreements that Qwest has entered into with various carriers and, of course, it cannot have copies of unwritten agreements. In this environment, it is fair to state that Eschelon does not know whether any carrier signed a document similar to Exhibit 21 and, if so, whether Qwest continued to make payments pursuant to that agreement. Eschelon is not claiming a right to this information. It is an issue for the Commission to investigate, if it so desires.

Qwest concludes its discussion of this issue by stating that "Qwest's and Eschelon's billing disputes are wholly unrelated to the 271 process." Eschelon agrees and, quite frankly, wishes Qwest would have taken this position much earlier. If it had, Eschelon could have participated in the 271 proceedings while negotiating disputes with Qwest. Qwest's assertion now begs the question as to why Qwest then conditioned negotiation of disputes on agreements not to participate in 271 proceedings.

**CMP Participation, Absence of Complaints, and  
Advocacy Regarding Participation in Proceedings**

Except when completely excluded from meetings, Eschelon maintained some level of participation in CMP.<sup>15</sup> Although Qwest was not always as successful in limiting Eschelon's participation in CMP as it desired,<sup>16</sup> Qwest's efforts nonetheless forced Eschelon to expend resources in responding to and resisting Qwest's position. *See, e.g.*, Exhibits 8 & 13. Those resources could have been expended on other CLEC business.

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<sup>15</sup> Although Eschelon managed to maintain some level of participation in CMP and CMP Re-design, Qwest succeeded particularly in chilling the number of live examples of problems with commercial performance that Eschelon brought to the meetings.

<sup>16</sup> As to whether Qwest attempted to influence Eschelon's level of participation, please see the previous section and attached exhibits.

Also, Eschelon had to consider the risks associated with upsetting its monopoly supplier while at the same time try to protect its own interests. This meant that Eschelon had to maintain a conciliatory tone and cooperate in Qwest's requests at times, even when full, uninhibited participation would have been preferable.<sup>17</sup>

Qwest also claims that, at any time, "Eschelon could have sought redress through **regulatory** or legal avenues." See Qwest's June 27 Letter, p. 2 (emphasis added). Qwest does not acknowledge the following restriction in the Escalation Letter:

During the development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001,<sup>18</sup> Eschelon agrees not to . . . **file complaints before any regulatory body** concerning issues arising out of the Parties' Interconnection Agreements.

See Exhibit 14 (Escalation Letter) (emphasis added), p. 1. Despite Qwest's sweeping claims to the contrary, Eschelon could not, consistent with its obligations, file complaints before any regulatory body regarding quality of service, pricing, discrimination, or any other issue arising under the interconnection agreement during negotiations or afterward. Qwest has not explained why it insisted on the terms of the Escalation Letter as part of proceeding to develop and implement a plan to address Eschelon's quality of service complaints. It has not said why Eschelon could not both work with Qwest to develop a plan and, until satisfied, participate in the 271 and SGAT workshops.<sup>19</sup> When a plan was successfully implemented, Eschelon could have then filed a withdrawal from the 271 proceedings and proclaimed its issues were resolved (as SunWest apparently did, see discussion below). If a plan was not successfully implemented, Eschelon could have filed complaints. Although Qwest's letters suggest that Eschelon was free to do so, the provisions of the Escalation Letter were a Qwest condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. See Exhibit 14; Eschelon's June 24 Letter (pp. 2-4).

Although Qwest conditioned obtaining and implementing a plan to improve service quality upon not opposing Qwest in 271 proceedings, Qwest claims that the purpose of the Escalation Letter "was not to suppress complaints but to *resolve* them." Qwest's June 18 Letter, p. 1 (emphasis in original). As discussed, the text of the Escalation Letter expressly suppresses complaints before, during, and after

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<sup>17</sup> Also, as indicated above, the limitations on Eschelon's participation did result in some decisions that lasted beyond the meetings in which Eschelon's participation was affected or precluded.

<sup>18</sup> As indicated in Eschelon's June 24 Letter, this date was extended until the end of July 2001.

<sup>19</sup> Qwest refers to agreements "wherein a CLEC agreed not to participate in the 271 proceeding" and states that "there were only **two** such agreements." Qwest's Comments, p. 3 (emphasis added). Qwest then goes on to discuss **three** such agreements: Eschelon, XO, and McLeodUSA (unwritten agreement "not to be involved in 271"). See *id.* pp. 4-5 & 8. Qwest has not explained why any of these agreements were necessary, if the information possessed by these three CLECs and their participation would not have affected the outcome of the 271 proceedings anyway, as claimed by Qwest.

implementation of a quality service plan. Additionally, as Eschelon previously pointed out:

[O]n October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to “deliver to Qwest all reports, work papers, or other documents related to the audit process” relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would “when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively).” Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals.

See Eschelon’s June 24 Letter, p. 5; *see also* Exhibit 21 (Proposed Confidential Billing Settlement Agreement, ¶ 7 & Proposed Confidential Purchase Agreement, ¶ 3). Ms. McKenney signed these proposals, copies of which are attached. *See id.*<sup>20</sup> Qwest has not explained the purpose of delivering all evidence of the audit process to Qwest, if not to “suppress” information. *See* Qwest’s June 18 Letter, p. 1.<sup>21</sup> With respect to the proposal that said Eschelon would “when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively),” *see id.*,<sup>22</sup> it provided no limitation on Qwest’s requests, such as that the testimony requested be true and accurate.<sup>23</sup> The agreement simply contained an offer of a monetary inducement to obtain services and testimony upon request.<sup>24</sup> The same document required that the agreement remain confidential.

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<sup>20</sup> Qwest has actually suggested that Ms. McKenney may represent Qwest on the committee it has said that it will form to review agreements with respect to the filing requirement. *See* Exhibit 22 (Excerpt from Minnesota transcript, p. 47, line 23 – p. 48, line 2 & p. 50, line 22 – p. 51, line 7).

<sup>21</sup> Although Qwest may argue that this provision relates to protecting customer-identifying information, that is not the case. Most of the audit documents contain no customer-identifying information. In any case, both Qwest and Eschelon routinely deal with customer-identifying and other confidential information without making one carrier turn everything over to the other. As indicated in Eschelon’s letter to Mr. Nacchio (discussed in Qwest’s Comments, p. 8), Qwest’s verbal communications to Eschelon suggested Qwest’s intent even more clearly than the written documentation.

<sup>22</sup> Qwest’s Proposed Confidential Purchase Agreement (¶ 3) also provided: “Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest’s interests may be implicated, including but not limited to, formal or informal proceedings related to Qwest’s or its affiliates’ efforts to obtain relief pursuant to section 271 . . . , including but not limited to, Change Management Process workshops, performance indicator/assurance dockets and cost dockets.” *See* Exhibit 21.

<sup>23</sup> The fact that Eschelon need not be reminded of its obligation to testify truthfully (as alleged by Mr. Martin) is evident from the fact that Eschelon (and not Qwest) raised this issue. Without language in the document to this effect, however, the proposed contractual obligation reads as Qwest intended it – as requiring Eschelon to testify when and how dictated by Qwest.

<sup>24</sup> Qwest’s proposal provided that payments would be made monthly so long as Qwest unilaterally determined that Eschelon was providing services “satisfactory” to Qwest. *See* Exhibit 21 at ¶ 2. Those

*See id.* Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony – it had been induced. Eschelon rejected Qwest’s proposals, although it did not do so lightly. Eschelon viewed this as its Cuban Missile Crisis with Qwest and genuinely did not know how Qwest would react.

Although Qwest claims that it was just negotiating routine settlement agreements, Qwest has not explained why provisions relating to delivery of evidence to Qwest or testifying as dictated by Qwest are legitimately related to resolving genuine service and pricing disputes. In negotiations, Qwest would not discuss resolution of legitimate issues such as missing switched access minutes, however, without also discussing a commitment by Eschelon relating to evidence and testimony. In its response, Qwest does not address the language of the documents in Exhibit 21. *See* Qwest’s Comments, p. 10. Similarly, when Eschelon raised this question in a letter to Qwest’s then Chief Executive Officer Joseph Nacchio (which was copied to Qwest’s current General Counsel),<sup>25</sup> Qwest did not respond to the specific facts. As Qwest indicates in its Comments, Qwest said that it would not “dignify each of Mr. Smith’s allegations with a response.” Qwest’s Comments, p. 9.<sup>26</sup> After reading the documents in Exhibit 21 and considering the absence of an explanation, however, a more reasonable conclusion is that Qwest was silent with respect to the proposals in Exhibit 21 because the documents speak for themselves.<sup>27</sup>

Instead of addressing that issue or acknowledging the express language of the Escalation Letter suppressing complaints, Qwest argues that Eschelon “evidenced a continuing awareness of its ability to go to the regulators if its concerns were not addressed.” Qwest’s June 27 Letter, p. 2; Qwest’s Comments, p. 7. The fact that Eschelon’s participation was virtually non-existent in 271 proceedings, combined with

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“services” included, for example, Change Management functions. *See id.* If Qwest was not “satisfied” in any particular month, Qwest could, in its discretion, penalize Eschelon for behavior it deemed bad by refusing payment. *See id.*

<sup>25</sup> Qwest states in its Comments (p. 8) that AT&T submitted a copy of Eschelon’s February 8, 2002, letter to Mr. Nacchio with its filing in both Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Therefore, Eschelon has not attached another copy with this filing. Although the Escalation Letter required Mr. Nacchio to meet with Eschelon, he refused to do so. Although Mr. Nacchio indicated that Ashfin Mohebbi would act on his behalf (*see* letter attached to Qwest’s Comments), the Escalation Letter specifically identified Mr. Nacchio and not a subordinate. *See* Exhibit 14. Moreover, despite Mr. Nacchio’s representation, Mr. Mohebbi never participated in escalation (or any) discussions.

<sup>26</sup> Qwest states that it attached a copy of Mr. Martin’s letter to its Comments, so Eschelon has not attached another copy with this filing.

<sup>27</sup> The other point that Qwest states it will not “dignify” with a response is a point that was not even made by Eschelon. *See* Qwest June 27 Letter, p. 1, note 1. Although Qwest focuses on some introductory language from a *Wall Street Journal* article cited by Eschelon, Eschelon’s June 24 Letter (p. 1) clearly cites the article as evidence to support Eschelon’s statement that “Qwest continually attempted to distinguish Qwest from the former company, US West.” The examples in the *Wall Street Journal* show this is the case. Qwest’s silence on this latter point may reasonably be viewed as an admission that it cannot dispute the truth of the statement about Qwest’s conduct vis a vis the former US West.

the absence of Eschelon complaints against Qwest (on non-cost issues),<sup>28</sup> shows that Eschelon was not in a position to put that advocacy to the test by risking a breach of the Escalation Letter. Eschelon did argue privately to Qwest that Eschelon believed it had the right to participate more fully in proceedings. Because Qwest routinely did not respond in writing to Eschelon's letters, Qwest has left itself the option of pointing to Eschelon's letters as though Qwest agreed with them at the time. Qwest fails to mention, however, that Qwest verbally opposed Eschelon's advocacy in this regard in no uncertain terms.

One example, in particular, stands out. Eschelon argued to Qwest that the Escalation Letter's requirement that Eschelon "not oppose" Qwest in 271 did not preclude participation in proceedings relating to the language of Qwest's Statement of Generally Available Terms ("SGAT").<sup>29</sup> For example, in a letter dated April 5, 2001, Eschelon argued to Qwest: "In theory, Eschelon can either shape interconnection agreements through participation in SGAT proceedings or we can attempt to negotiate agreements with Qwest as desired by Qwest. . . . Either the Implementation Plan must deal substantively with the interconnection agreement process or Eschelon must participate in SGAT proceedings." Exhibit 23, p. 4. Although Qwest is not specific, Eschelon's assertion in this letter apparently "evidenced a continuing awareness" of Eschelon's ability to participate in SGAT proceedings. On this particular occasion, Eschelon not only made its argument but also attempted to act upon it. Eschelon sent a representative, Ms. Clauson, to the multi-state SGAT workshop held in Denver April 30 – May 2, 2001.

Qwest's opposition was swift and unambiguous. Shortly after Ms. Clauson entered the room where the workshop was held, Nancy Lubamersky of Qwest picked up her cell phone and left the room. Before the first break, Qwest had called Eschelon's President to complain of Ms. Clauson's presence. In addition, at the outset of the first break, Qwest's attorney Charles Steese summoned Ms. Clauson to the hallway for a conversation. Mr. Steese told Ms. Clauson in no uncertain terms that she should not be present. He said that he had it on good authority that the agreement to keep Eschelon out of the 271 proceedings specifically included Ms. Clauson. Ms. Clauson attempted to explain the actual language of the Escalation Letter, but Mr. Steese was not interested. Through Qwest's calls to Eschelon and conversation with Ms. Clauson, Qwest succeeded in chilling Eschelon's full participation. After the workshop, Qwest called Eschelon to the carpet and made Eschelon explain "what Karen Clauson had said and had not said" during the workshops. *See* Exhibit 24. In a follow up conference call "to discuss Karen's participation in that meeting and in similar future meetings," *see id.*, Qwest reiterated its position that Eschelon could not participate in the SGAT workshops. Eschelon did not participate in 271/SGAT workshops after this additional demonstration of Qwest's opposition.

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<sup>28</sup> The Escalation Letter provided that Eschelon could, after notice to Qwest, participate in regulatory cost dockets or dockets regarding the establishment of rates. *See* Exhibit 14.

<sup>29</sup> *See* Eschelon's June 24 Letter, p. 3 & note 8.

### **271 Participation: March of 2002 and After**

Qwest states: “Importantly, the Agreement, including any agreement not to oppose Qwest’s application for relief under Section 271, was terminated in February of 2002. To the extent that Eschelon decided not to participate fully in the 271 process after that termination, it was Eschelon’s internal business decision that mandated that result, not the Agreement.” Qwest’s June 27 Letter, p. 2; *see also* Qwest’s Comments, p. 7. The agreement to not oppose Qwest’s 271 bid did not terminate until an effective date of February 28, 2002. *See* Exhibit 25. That agreement was executed on the afternoon of Friday, March 1, 2002. *See id.* Therefore, the first business day on which Eschelon could actually participate in Qwest 271 proceedings was March 4, 2002. On March 4, 2002, Eschelon provided discovery responses to the Minnesota commission, including a 3-inch, 3-ring binder of materials, in Minnesota’s 271 proceeding. Minnesota had completed fewer 271 workshops or hearings at that point than other states, and it was one of the few states in which discovery had been directed to Eschelon. Shortly afterward, Eschelon provided similar materials to the Washington commission in response to discovery requests in its 271 proceeding. Recently, Eschelon filed comments with the Federal Communications Commission (“FCC”) in opposition to Qwest’s 271 application. *See* Exhibit 26 (also available, with exhibits, at <http://www.fcc.gov/e-file/ecfs.html>).

Significantly, Qwest discusses Eschelon’s alleged lack of participation in 271 proceedings after termination of the agreement without mentioning that the 271 workshops were essentially completed by then and, when Eschelon has attempted to participate, Qwest has opposed those efforts. In Arizona, Eschelon understood that all workshops were completed by March 2002. Arizona held special open meetings addressing Qwest Operations Support Systems (“OSS”) and Performance Assurance Plan (“PAP”) after that date, but those meetings would have been particularly difficult to participate meaningfully in without the benefit of participation in the preceding proceedings on those complex topics. To the extent that any 271 proceedings in other states remained active, they were so far along that getting up-to-speed on substance and procedure in time to participate meaningfully was not a realistic possibility. Moreover, when Eschelon attempted to participate in the Minnesota 271 proceeding and to support AT&T’s efforts to re-open other proceedings, Qwest opposed those efforts. In Minnesota, Qwest filed a motion to strike Eschelon’s testimony. Absence from the 271 proceedings for a period of more than a year has affected Eschelon’s ability to participate effectively in 271 proceedings at this point. Although Eschelon has attempted to participate in 271 proceedings on and after March 4, 2002, the reality is that Qwest succeeded in its objective that Eschelon not participate meaningfully for the time period when participation mattered.

Ironically, after criticizing Eschelon for not participating in 271 proceedings after February of 2002 (*see* Qwest’s June 27 Letter, p. 2; Qwest’s Comments, p. 7), Qwest will likely complain now that Eschelon has filed comments with the FCC in opposition to



Qwest's 271 bid. Qwest has questioned the motives of other CLECs that have challenged its 271 bid on the grounds that they are merely trying to keep Qwest out of their market rather than raising genuine concerns. Qwest may do so now as to Eschelon as well. Eschelon is not an interexchange carrier ("IXC") itself; Eschelon resells the long distance service of another carrier. Eschelon recognizes, however, that allowing Qwest to enter the in-region, interLATA market prematurely would be detrimental to Eschelon, as well as other CLECs and IXCs in Qwest's territory. When weighing this as a motive for Eschelon's actions, however, the Commission should consider that Eschelon nonetheless at one time entered into the Escalation Letter and said it would possibly even support Qwest's 271 bid in 271 proceedings if Qwest's performance justified doing so. That didn't work. Eschelon is opposing Qwest's 271 bid now because genuine commercial performance issues show that Qwest's entry into the in-region long distance market at this time would be premature. *See Exhibit 26.*

### **Any Benefit Unrelated to Limitation on 271 Participation**

Qwest argues that persuading CLECs to stay out of the 271 proceedings aided the process and benefited all CLECs. *See* Qwest's Comments, pp. 7 & 10. For example, Qwest argues that developing an implementation plan to improve the provisioning process for Eschelon benefited all CLECs because the improved process was implemented uniformly. *See id.* While Eschelon agrees that efforts to improve Qwest's provisioning process benefited CLECs, as well as Qwest, Eschelon does not agree that this could not have been done without an agreement to stay out of 271 proceedings. Qwest could have simply worked with CLECs to understand their needs and the CLEC perspective and then improved its processes accordingly. Unfortunately, Qwest was not willing to proceed on that basis.<sup>30</sup>

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<sup>30</sup>Qwest entered into a confidential agreement with Eschelon, which has since been terminated as to Eschelon, providing for a 10% consulting fee. *See* Consulting Fee Agreement, at ¶ 3. Qwest could have filed this agreement with the commissions and made it available to other CLECs, but it chose not to do so. The fee was part of an arrangement under which Qwest was supposed to purchase consulting services from Eschelon that would benefit all CLECs. As indicated, Qwest recently testified that it now places a "very high value" on the consulting services of Eschelon. *See* Rixe Testimony, p. 9, line 15. Eschelon firmly believes that its efforts were valuable and, in arguing this point, provided documentation and information to Qwest to support Eschelon's position. While Eschelon believes that Qwest benefited from Eschelon's actions because Eschelon expended substantial resources trying to get Qwest to improve its performance, Qwest did not recognize this at the time or actually accept the consulting services. Qwest resisted Eschelon's efforts to form teams or otherwise work on a true consulting basis to improve Qwest's processes. The amount of resources that Eschelon expended to attempt to effectuate change were far more excessive than they needed to be if Qwest had accepted Eschelon's services willingly, given Eschelon (and other CLECs) visibility into its processes, and worked together at an early stage to ensure that processes, when developed, met CLEC needs. For Qwest to now describe in favorable terms its adversarial position that caused such additional resource expenditures does not capture the true course of events, even though Eschelon does agree that its efforts benefited Qwest and other CLECs as well. More recently, it has come to light that Qwest was entering into other unfiled agreements at the time, such as reported agreement(s) ostensibly to purchase fiber capacity, for a discount. If so, this additional information provides further evidence that Qwest's costs are not cost-based, because they allow for Qwest to offer these "discounts" in various forms, and the resale discount, in particular, may need to be reviewed.

### **What Could Have Been**

Qwest attempts to place an unattainable burden on CLECs: to show what would have transpired if the 271-related agreements had not existed. *See, e.g.*, Qwest's June 27 Letter, p. 1. Because of such an agreement, however, Eschelon was not involved in the 271 process and does not know whether all of its issues have been addressed. Eschelon can indicate that Qwest commercial performance problems still exist. *See* Exhibit 26. Eschelon can also point out that its business plan is different from other CLECs that were involved in the process. Eschelon recognizes and appreciates the diligent, resource-intensive, and valuable efforts of larger CLECs, but their needs and those of Eschelon are not the same. In fact, none of the "committed advocates" listed by Qwest as participants in the proceeding have the same needs or information as Eschelon. *See* Qwest's Comments, p. 11. Nor do they have the commercial experience in Qwest's territory comparable to that of Eschelon and McLeodUSA, reportedly Qwest's two largest wholesale customers, neither of which participated. Undoubtedly those participants are committed, but different business plans and commercial experience are significant factors when shaping terms of an SGAT or analyzing commercial performance.

The existence or non-existence of the 271-related agreements is not the only factor affecting what could have been. In June of 2001, Qwest received discovery requests that, by its own account, sought production of the agreements not to participate in 271, but Qwest did not produce them. This fact presents the question of what would have transpired if Qwest complied with the discovery request last June.

On June 11, 2001, AT&T served the following discovery request on Qwest:

Please produce all agreements, letters and other documents of any kind that reflect the terms and provisions, or any term or provision, of settlement made between Eschelon and Qwest.

Exhibit 27 (AT&T's Thirteenth Set of Data Requests to Qwest, Request No. 126, 271 multi-state proceeding, June 11, 2001).<sup>31</sup>

AT&T also requested copies of such agreements with McLeodUSA and a company called Sun West Communications, Inc. ("SunWest"). *Id.*<sup>32</sup> SunWest had raised issues relating to Qwest's provisioning of unbundled loops deployed over IDLC with number portability in the Colorado 271 workshop. On June 1, 2001, Qwest filed a

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<sup>31</sup> Also available at [www.libertyconsultinggroup.com/discovery\\_requests.htm](http://www.libertyconsultinggroup.com/discovery_requests.htm).

<sup>32</sup> In addition, with respect to any carrier, AT&T requested any "settlement made by Qwest of any dispute over Qwest's compliance, or lack of compliance, with one or more items of the competitive checklist set forth in 47 USC § 271(c)(2)(B)." *Id.*

“Withdrawal of Opposition to Qwest’s Petition to Obtain Approval to Enter the In-Region InterLATA Telecommunication Market” in the Colorado 271 docket on behalf of SunWest [Withdrawal]. *See* Exhibit 28. In the Withdrawal, SunWest said that it had reached a settlement with Qwest. SunWest also said that the issues it raised in the Section 271 workshops had been resolved to SunWest’s satisfaction. *See id.* The timing of AT&T’s discovery request (dated ten days after the Withdrawal) suggests that the mention of a “settlement” in the Withdrawal prompted AT&T’s request. By June 11, 2001, Eschelon was absent from 271 workshops, even though Eschelon had previously raised significant issues in those proceedings. Unlike SunWest, Eschelon’s quality of service issues had not been resolved to Eschelon’s satisfaction.

With respect to SunWest, Eschelon, and McLeodUSA, AT&T requested “settlement” agreements. Qwest specifically states that the two agreements referred to by Commissioner Spitzer that mention Section 271 proceedings, which include the Eschelon Escalation Letter, are “settlements.” *See* Qwest June 18 Letter, p. 1. Therefore, by Qwest’s own account, the agreements are responsive to AT&T’s request. Qwest responded, however, by objecting to the request without providing copies of any agreements.<sup>33</sup> Qwest said:

In addition to the General Objection, Qwest objects to this request on the grounds that it is overly broad, global, seeks information protected by the attorney-client privilege, attorney work product doctrine, or any other legally cognizable privilege, seeks third-party confidential information, seeks information that is highly confidential, proprietary, and competitively sensitive, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

*See* Exhibit 29 (Qwest’s Objections and Responses to AT&T’s Thirteenth Set of Data Requests, Response to Request No. 126, 271 multi-state proceeding, June 20, 2001).<sup>34</sup>

Although Qwest objected that the Request called for “third-party confidential information,” Qwest did not ask Eschelon for consent to disclose any agreements before responding to AT&T’s request, despite language in some of the agreements indicating that they could be disclosed with express written consent of the other party. Nothing in the Escalation Letter prevented Qwest from seeking consent to provide copies in discovery. In addition, with respect to the Consulting Fee Agreement (¶ 10), it provides:

In the event either Party . . . has a legal obligation which requires disclosure of the terms and conditions of this Confidential Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take

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<sup>33</sup> On every occasion on which Eschelon has been asked to produce its unfiled agreements with Qwest in discovery, Eschelon has provided copies of them (including the Escalation Letter).

<sup>34</sup> Also available at [www.libertyconsultinggroup.com/discovery\\_requests.htm](http://www.libertyconsultinggroup.com/discovery_requests.htm).

such action as may be legally permissible so as to protect the confidentiality provided in this Agreement.

Although Eschelon received a copy of the above discovery request directed to Qwest, Eschelon did not exercise its option to take any action to protect the confidentiality provided in the Agreement. Yet, Qwest did not produce the Consulting Fee Agreement or any of the other agreements, including the Escalation Letter, to AT&T in its Response. As indicated, AT&T served its discovery request upon Qwest on **June 11, 2001**. If Qwest had provided AT&T with copies of the Eschelon, McLeodUSA and other agreements at that time, AT&T (and any other party receiving copies of discovery responses) could have raised the issues being addressed by the Commission now at least **seven months** earlier.<sup>35</sup> The Commission will decide whether, in addition to identifying any “specific terms or issues” that were not addressed in the 271 workshop process,<sup>36</sup> these facts are relevant.

### **Conclusion**

In Eschelon’s June 24 Letter, Eschelon indicated that it hesitated to send its letter for a number of reasons, including the state of the telecommunications market, tight resources particularly for a start-up, smaller company, and the fact that Eschelon has settled some of its own claims with Qwest and may be viewed as late in speaking out. Twenty-some additional pages and many exhibits later, Eschelon can confirm that going down this path has caused resource expenditures. Given the statements in Qwest’s June 27 Letter and Qwest’s Comments and the Commission’s expression of its desire for more information to assess those statements, however, it seems incumbent upon Eschelon to provide this information. At the same time, Eschelon is aware that some may criticize Eschelon for entering into unfiled agreements with Qwest. Eschelon had pressing service and pricing issues that it needed resolved to stay alive.<sup>37</sup>

With respect to Qwest’s application for 271 approval, Eschelon has stated its position in its FCC filing. *See* Exhibit 26. Although Eschelon was not an active participant in the Arizona 271 proceeding so it cannot state how each of these issues was addressed, Eschelon can state that the unresolved commercial performance problems described in those Comments occur in Arizona as well. With respect to issue of the impact of the unfiled 271-related agreements on the proceeding, Eschelon has laid out facts responsive to points raised by Qwest that the Commission may use in making its

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<sup>35</sup> A&T has indicated that it did not learn of the agreements until after the Minnesota Department of Commerce filed its complaint relating to unfiled agreements in February of 2002. Although AT&T’s discovery request was served in the multi-state 271 proceeding, information from one proceeding often also becomes available in other proceedings. Once AT&T received the information in the multi-state proceeding, AT&T could have also requested it in Arizona, for example.

<sup>36</sup> Eschelon believes that it has identified such terms and issues, because it has identified commercial performance problems that remain unresolved. *See* Exhibit 26.

<sup>37</sup> When considering relative positions of the parties, Eschelon is a \$100 million CLEC with 900 employees, and Qwest is a \$19 billion RBOC with 60,000 employees.

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Commissioner Jim Irvin  
July 10, 2002  
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determination. Commissioner Spitzer's Letter of June 26 suggested that Eschelon and Qwest address the inconsistencies between their earlier letters, and Eschelon has tried to be responsive to that request.

Sincerely,

J. Jeffery Oxley  
Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell (by facsimile & overnight mail)  
Todd L. Lundy, Qwest (by U.S. mail)  
Richard Corbetta, Qwest (by email)  
Paul A. Bullis, AG Public Advocacy Division (by U.S. mail)  
Lindy P. Funkhouser, Residential Utility Consumer Office (by email & U.S. mail)  
Docket Control (original plus 20 copies) (by overnight mail)  
Service Lists (all parties of record in both dockets) (by email & U.S. mail)